

MOTION FILED
JUL 17 1986

3

No. 85-2079

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST
FUND FOR NORTHERN CALIFORNIA, *et al.*,
v. *Petitioners,*

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION OF THE LABORERS INTERNATIONAL UNION
OF NORTH AMERICA NATIONAL (INDUSTRIAL)
PENSION FUND FOR LEAVE TO FILE A BRIEF
AND BRIEF AS AMICUS CURIAE**

ROBERT J. CONNERTON *
JAMES S. RAY
TERESE M. CONNERTON
CONNERTON, BERNSTEIN & KATZ
Suite 800
1899 L Street, N.W.
Washington, D.C. 20036
(202) 466-6790
Attorneys for the
Laborers International Union
of North America National
(Industrial) Pension Fund

* Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-2079

LABORERS HEALTH AND WELFARE TRUST
FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**MOTION OF THE LABORERS INTERNATIONAL UNION
OF NORTH AMERICA NATIONAL (INDUSTRIAL)
PENSION FUND FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE**

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the
Laborers International Union of North America National
(Industrial) Pension Fund (the "Pension Fund") re-
spectfully moves for leave to file the accompanying brief

as *amicus curiae* in support of the petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; Respondents have not.

INTEREST OF THE PENSION FUND

The Pension Fund is a labor-management trust fund established pursuant to section 302(c)(5) of the Labor-Management Relations ("Taft-Hartley") Act [29 U.S.C. § 186(c)(5)] and administered by a board of union and employer appointed trustees to provide pension benefits to workers represented for purposes of collective bargaining by affiliates of the Laborers International Union of North America ("LIUNA"). It is also a multiemployer pension plan within the meaning of and covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

More than twenty thousand workers are covered by the Pension Fund. And currently more than five hundred employers scattered over nearly all fifty States (including States within the Ninth Circuit) contribute to the Pension Fund pursuant to collective bargaining agreements with LIUNA local unions and district councils. Employer contributions are based on a bargained amount for each hour, day or week worked by a covered laborer.

The Pension Fund is typical of national and regional multiemployer pension plans. And as with other such plans, the prompt collection of employer contributions is an essential function of the Pension Fund. Those contributions provide the funding necessary to pay monthly pension benefits to retirees.

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") [P.L. 96-364, 94 Stat. 1208 (1980)] amendments to ERISA greatly enhanced the effectiveness of the Pension Fund's contribution collection program. The provision in ERISA section 502(g)(2) [29 U.S.C. § 1132(g)(2)] of mandatory interest, liquidated damages

and attorneys' fees remedies has discouraged employees from becoming delinquent. Where employers fail in their obligation to contribute, ERISA section 515 [29 U.S.C. § 1145], added by MPPAA, provides an effective and generally efficient mechanism for judicial enforcement. This is all in accordance with the Congressional design of fostering the flow of employer contributions into multiemployer plans, thereby improving the plans' funding base and securing the pension benefits of plan participants.

The decision by the Court of Appeals in this case, unless overturned by this Court, will impede the ability of the Pension Fund, and all other multiemployer plans, to promptly and fully collect vital employer contributions. In view of the number of individual collective bargaining relationships on which the Pension Fund depends for contributions, the Pension Fund is frequently confronted with having to collect contributions during the sometimes long periods between collective bargaining agreements. Commonly, an employer is delinquent for a period during the term of a collective bargaining agreement as well as for the period while bargaining on a new agreement is progressing. By restricting the Pension Fund's enforcement recourse to filing an unfair labor practice charge with the National Labor Relations Board, the decision below would deprive the Pension Fund of (1) the delinquency disincentives of the ERISA section 502(g)(2) remedies, (2) control over the essential, fiduciary function of contribution collection, and (3) an efficient, prompt and effective means of maintaining contribution flow. As a result, the funding of the Pension Fund and the retirement income of the workers it covers would be less secure.

In short, this case presents an issue of federal law that is of compelling importance to the Pension Fund and all other multiemployer plans, and that raises national policy concerns that can only be resolved by this Court.

ISSUES DEVELOPED BY THE PENSION FUND

The Pension Fund's brief focuses on issues which it believes may not be adequately addressed elsewhere, including:

(a) resolution of the case requires interpretation and accommodation of national employee benefits policy and national labor policy which only this Court can authoritatively provide; and

(b) ERISA plainly vests exclusive jurisdiction in the courts to make impasse determinations in an employer withdrawal liability context, and there is no rational basis for precluding courts from making such determinations in suits to collect employer contributions.

The Pension Fund, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

ROBERT J. CONNERTON

JAMES S. RAY

TERESE M. CONNERTON

CONNERTON, BERNSTEIN & KATZ
Suite 800

1899 L Street, N.W.

Washington, D.C. 20036

(202) 466-6790

Dated: July 17, 1986

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE PENSION FUND	2
REASONS FOR GRANTING REVIEW	3
I. RESOLUTION OF THE CASE REQUIRES INTERPRETATION AND ACCOMMODATION OF NATIONAL LABOR POLICY WHICH ONLY THIS COURT CAN AUTHORITA- TIVELY PROVIDE	3
II. ERISA PLAINLY VESTS EXCLUSIVE JU- RISDICTION IN THE COURTS TO MAKE IMPASSE DETERMINATIONS IN AN EM- PLOYER WITHDRAWAL LIABILITY CON- TEXT, AND THERE IS NO RATIONAL BASIS FOR PRECLUDING COURTS FROM MAKING SUCH DETERMINATIONS IN SUITS TO COLLECT EMPLOYER CONTRI- BUTIONS	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 504 (1981)	3
<i>Carpenters Local 1846 v. Pratt-Farnsworth</i> , 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983)	5
<i>Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.</i> , 472 U.S. —, 86 L.Ed.2d 447 (1985)	3, 4
<i>Connell Construction Co. v. Plumbers & Steamfitters</i> , 421 U.S. 616 (1975)	5
<i>Connolly v. Pension Benefit Guaranty Corp.</i> , 475 U.S. —, 89 L.Ed.2d 166 (1986)	3, 6
<i>Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for So. California</i> , 463 U.S. 1 (1983)	6
<i>Kaiser Steel Corp. v. Mullins</i> , 455 U.S. 72 (1982)	3, 4, 5
<i>Massachusetts Mutual Life Ins. Co. v. Russell</i> , 473 U.S. —, 87 L.Ed.2d 96 (1985)	6
<i>Menhorn v. Firestone Tire & Rubber Co.</i> , 738 F.2d 1496 (9th Cir. 1984)	6
<i>Moldovan v. Great Atlantic & Pacific Tea Co., Inc.</i> , 790 F.2d 894 (3d Cir. 1986)	5
<i>Nachman Corp. v. Pension Benefit Guaranty Corp.</i> , 446 U.S. 359 (1980)	3
<i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 (1981)	3
<i>Pension Benefit Guaranty Corp. v. R.A. Gray & Co.</i> , 467 U.S. 717 (1984)	3, 6, 7
<i>Producers Dairy Delivery v. Western Conference of Teamsters</i> , 654 F.2d 625 (9th Cir. 1981)	7
<i>Textile Workers v. Lincoln Mills</i> , 353 U.S. 448 (1957)	6
<i>Trustees of Amalgamated Insurance Fund v. Geltman Industries, Inc.</i> , 784 F.2d 926 (9th Cir. 1986)	8
<i>U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.</i> , 790 F.2d 423 (5th Cir. 1986)	5
<i>Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund</i> , 789 F.2d 691 (9th Cir. 1986)	6, 7

TABLE OF AUTHORITIES—Continued

Statutes	Page
Employee Retirement Income Security Act of 1974, 29 U.S.C.	
§§ 1101-1109	4
§ 1132(a) (3), (e)	4
§ 1132(g) (2)	4
§ 1145	4
§ 1383(a)	7
§ 1392(a)	7
§ 1451(a), (c)	7
§ 1451(b)	8
Labor-Management Relations ("Taft-Hartley") Act, 29 U.S.C.	
§ 185	6
Legislative Materials	
Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980)	4
126 Cong. Rec. S11673-74 (daily ed. August 26, 1980)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-2079

LABORERS HEALTH AND WELFARE TRUST
FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,
v.
ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE LABORERS INTERNATIONAL UNION
OF NORTH AMERICA NATIONAL (INDUSTRIAL)
PENSION FUND AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

The Laborers International Union of North America National (Industrial) Pension Fund (the "Pension Fund") submits this brief as *amicus curiae* to urge the Court to review the holding of the Court of Appeals that the federal courts lack jurisdiction over suits brought by multiemployer plan trustees pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, to collect employer contributions due for the period between the expiration of a collective bargaining agreement and impasse in bargaining for a new agree-

ment. We submit that the appeals court's conclusion—that plan trustees' only recourse for collecting such contributions is to file unfair labor practice charges with the National Labor Relations Board ("NLRB")—is erroneous, and that national employee benefits policy demands reversal of the decision by this Court.

INTEREST OF THE PENSION FUND

As described in the motion for leave to file this brief, the Pension Fund and its Board of Trustees have a keen interest in the issue presented by this case. This Court has already recognized and discussed the vital role of employer contributions in the financing of multiemployer pension as well as health and welfare plans. Unless reversed, the decision below will greatly impede the ability of the Pension Fund, and all other multiemployer plans, to promptly and fully collect employer contributions and thereby jeopardize the financial standing of the Pension Fund and the retirement income security of the laborers covered by the Pension Fund. The Pension Fund will be denied access to the efficacious federal court forum which Congress intended for collection of contribution delinquencies. The fiduciary function of collecting contributions will be taken from the Board of Trustees and placed in the hands of NLRB personnel who are not responsible to the Pension Fund's trustees or participants. And the Pension Fund will be deprived of the ERISA remedies which Congress created to discourage employers from becoming delinquent in their contribution obligations.

The petition submitted by the Petitioners contains an extensive discussion of several persuasive compelling reasons for this Court to grant review. We also understand that the National Coordinating Committee for Multiemployer Plans ("NCCMP") is filing a motion and brief as an *amicus curiae*. The Pension Fund agrees with the positions stated in the petition and the NCCMP's brief, and accordingly has attempted to avoid burdening the Court with repetition. However, the Pension Fund urges

the Court to consider the additional points and authorities contained herein.

REASONS FOR GRANTING REVIEW

I. RESOLUTION OF THE CASE REQUIRES INTERPRETATION AND ACCOMMODATION OF NATIONAL LABOR POLICY WHICH ONLY THIS COURT CAN AUTHORITATIVELY PROVIDE.

As the Court has repeatedly observed, ERISA was enacted in 1974 primarily to ensure that workers and their beneficiaries received their anticipated pension benefits upon retirement, and that they not be deprived of those benefits because of, among other reasons, insufficient funds in their pension plans. See *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. —, 86 L. Ed. 2d 447, 457 (1985); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In 1980, ERISA was substantially amended with respect to multiemployer plans by the Multiemployer Pension Plan Amendments Act ("MPPAA"), P. L. 96-364, 94 Stat. 1208. MPPAA was a response to Congress' finding, after lengthy study, that multiemployer pension plans were vulnerable to financial instability. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-87 (opinion of the Court), 91-99 (Brennan, J., dissenting) (1982); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, *supra*; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. —, 89 L. Ed. 2d 166 (1986). See also *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981). And, as this Court has recognized, Congress has identified the failure of some employers to make full and timely contributions as a key factor undermining the financial soundness of plans. See *Kaiser Steel, supra*; *Central Transport*, 86 L. Ed. 2d at 464 n.22.

Congress found further that the legal recourse then available to plan trustees for the enforcement of contribution obligations was inadequate, and deliberately acted to correct this deficiency and provide a simple, efficient and effective means for plan trustees to collect delinquent contributions. See *Kaiser Steel*, 455 U.S. at 87, 91-96 (quoting pertinent MPPAA legislative history). It declared that "[t]he public policy of [MPPAA] to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection." *Id.* at 94 n.3, quoting, Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980). And to implement this policy, MPPAA added to ERISA section 515 [29 U.S.C. § 1145], which provides trustees with a statutory cause of action to collect delinquent contributions, and section 502(g)(2) [29 U.S.C. § 1132(g)(2)], which mandates courts to award interest, liquidated damages, and attorneys' fees to plan trustees who prevail in a section 515 suit. *Id.* Importantly, Congress vested the federal courts with exclusive jurisdiction over contribution collection actions. See ERISA § 502(a)(3), (e) [29 U.S.C. § 1132(a)(3), (e)]. See also *Kaiser Steel*, 455 U.S. at 93-96.

This policy reflected in the MPPAA amendments complements another aspect of the national employee benefits policy expressed through the minimum standards of fiduciary conduct set forth in ERISA §§ 401-409 [29 U.S.C. §§ 1101-1109]. Reading into these ERISA standards common law trust principles, this Court recently held that multiemployer plan trustees bear a strict fiduciary duty to identify workers on whose behalf contributions are owed and to make reasonable efforts to collect delinquent employer contributions. See *Central Transport*, 86 L. Ed. 2d at 475-61. The Court further ruled that this fiduciary duty is not delegatable to a union, whose collective bargaining agreement requires the contributions, or to a governmental body. *Id.* at 461-63.

The court of appeals in this case, like two other federal appeals courts which have since addressed the issue,¹ subordinated these ERISA-based national employee benefits concerns to its understanding of the current law of NLRB preemption. At the core of the court's holding is a belief that the fiduciary lacks jurisdiction to make determinations as to whether a bargaining impasse has been reached so as to terminate the employer's post-contract contribution obligations.

However, preemption is not a mechanical formula; nor does it involve a rigid application of clear Congressional intent. Rather, whether a court is preempted from ruling on a matter normally within the province of the NLRB often rests upon a judicial evaluation of the national labor policy interests as compared with competing policies. And on several occasions this Court has weighed the competing interests more heavily and sanctioned judicial resolution of unfair labor practice issues and other matters over which the NLRB normally exercises exclusive jurisdiction. See, e.g., *Kaiser Steel*, 455 U.S. at 83-85; *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). Cf. *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 517-19 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983) (court can decide the appropriateness of a bargaining unit in the context of a Taft-Hartley Act section 301 suit to enforce a collective bargaining agreement, particularly in view of the related ERISA contribution collection claims).

In a case like this, involving a balance between national employee benefits policy and national labor policy, review by this Court is particularly appropriate. This is because Congress in enacting ERISA charged the judiciary with the obligation and the power to formulate a substantive federal common law of employee benefits to implement

¹ *Moldovan v. Great Atlantic & Pacific Tea Co., Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986).

and supplement the express statutory terms in a fashion akin to the way the courts have carried out the mandate of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), with respect to section 301 of the Taft-Hartley Act. [29 U.S.C. § 185] See, e.g., *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for So. California*, 463 U.S. 1, 24 n.26, 26 (1983); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. —, 87 L. Ed. 2d 96, 112-13 (Brennan, J., concurring in judgment) (1985); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1498-1500 (9th Cir. 1984). The Court, we submit, has a special obligation under the ERISA regulatory scheme to review the policy balance struck by the Ninth Circuit.

II. ERISA PLAINLY VESTS EXCLUSIVE JURISDICTION IN THE COURTS TO MAKE IMPASSE DETERMINATIONS IN AN EMPLOYER WITHDRAWAL LIABILITY CONTEXT, AND THERE IS NO RATIONAL BASIS FOR PRECLUDING COURTS FROM MAKING SUCH DETERMINATIONS IN SUITS TO COLLECT EMPLOYER CONTRIBUTIONS.

In concluding that only the NLRB can make bargaining impasse determinations, the court of appeals failed to consider that ERISA, as amended by MPPAA, on its face vests exclusive jurisdiction in the courts to make precisely the same impasse determinations in the context of suits to collect employer withdrawal liability. Yet, subsequently a different panel of the same appeals court ruled that the courts (not the NLRB) are required to make bargaining impasse determinations in suits by multiemployer plans to recover withdrawal liability from employers, and it remanded the case to the lower court for such a determination. See *Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986).

As discussed by this Court in the *R.A. Gray* and *Connolly* cases, MPPAA introduced a statutory liability for

employers which withdraw from multiemployer pension plans under certain conditions. This potential liability was another aspect of the legislation's overall design to enhance the financial stability of multiemployer pension plans.

Whether an employer has incurred a "complete withdrawal" from a plan so as possibly to be subject to liability depends in part on whether the employer has permanently ceased "to have an obligation to contribute under the plan." ERISA § 4203(a) [29 U.S.C. § 1383 (a)]. The term "obligation to contribute" is defined by ERISA § 4212(a) [29 U.S.C. § 1392(a)] to include "an obligation to contribute arising . . . as a result of a duty under applicable labor-management relations law. . . ." This encompasses the employer's obligation under the National Labor Relations Act to continue contributing to multiemployer plans after its collective bargaining agreement has expired until such time as it bargains to impasse with the union (or reaches a new agreement). *Woodward Sand*, 789 F.2d at 695.

Under ERISA § 4301(a),(c) [29 U.S.C. § 1451(a),(c)] exclusive jurisdiction is vested in the federal and state courts over suits by plan trustees to collect employer withdrawal liability. See generally *R.A. Gray & Co.*, 467 U.S. at 717. And such suits, as we have shown, necessarily involve the courts in determining whether the employer continues to have an obligation to contribute; that is, whether the employer's collective bargaining agreement has expired and he has bargained to impasse.

The *Advanced Lightweight* panel seriously erred in neglecting to consider this aspect of the MPPAA-ERISA legislative scheme. First, it establishes that Congress does not consider bargaining impasse determinations to be the exclusive province of the NLRB any longer (if it ever was²). Second, MPPAA and its legislative history clearly

² See, e.g., *Producers Dairy Delivery v. Western Conference of Teamsters*, 654 F.2d 625 (9th Cir. 1981).

reflect a Congressional intent that claims by multiemployer withdrawal liability should be treated in the same manner as claims for delinquent employer contributions. See ERISA § 4301(b) [29 U.S.C. § 1451(b)]; 126 Cong. Rec. S11673-74 (daily ed., August 26, 1980) (remarks of Sen. Williams). See also *Trustees of Amalgamated Insurance Fund v. Geltman Industries, Inc.*, 784 F.2d 926, 931-32 (9th Cir. 1986). There is no rational basis for holding that courts may make impasse determinations in withdrawal liability collection suits but plans must resort to the NLRB when confronted by delinquent employer contributions.

CONCLUSION

For these and the reasons stated in the petition and in the NCCMP *amicus* brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. CONNERTON *

JAMES S. RAY

TERESE M. CONNERTON

CONNERTON, BERNSTEIN & KATZ

Suite 800

1899 L Street, N.W.

Washington, D.C. 20036

(202) 466-6790

Attorneys for the

*Laborers International Union
of North America National
(Industrial) Pension Fund*

* Counsel of Record

Dated: July 17, 1986